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October 15, 2013

By ECF & Facsimile (212) 805-7925

Honorable Robert W. Sweet
United States District Court for the Southern District of
New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: In re Facebook, Inc., IPO Securities and Derivative Litigation,
MDL No. 12-2389 (RWS)

Dear Judge Sweet:

We write in response to Mr. Lovell's letter of October 11, 2013 concerning the provisions of the by-laws of NASDAQ OMX cited in the NASDAQ defendants' reply brief and at oral argument.

As noted in our initial memorandum and in our reply in support of the NASDAQ defendants' motion to dismiss, courts apply a functional analysis to determine SRO immunity, focusing on the nature of the conduct at issue and not the identity of the actor. (*See* Doc. No. 127 at 17 n.13, 20-21; Doc. No. 153 at 16.) Plaintiffs do not disagree. (*See* Doc. No. 147 at 16.) For that reason, NASDAQ OMX and its officers are entitled to the same immunity as the Exchange from claims arising from or incident to the exercise of the Exchange's delegated regulatory functions. In a similar context, the Second Circuit affirmed the dismissal of claims against a non-SRO affiliate of NASD and one of its officers on SRO immunity grounds in *DL Capital*.

Section 12.1(c) of the by-laws of NASDAQ OMX buttresses the NASDAQ defendants' argument for dismissal of the claims asserted against NASDAQ OMX and its officers by providing that the officers of NASDAQ OMX are "deemed to be" officers of the Exchange for purposes of the Exchange Act when their activities "are related to the activities of [the Exchange]":

To the extent they are related to the activities of a Self-Regulatory
Subsidiary [including the Exchange], the books, records, premises,
officers, Directors, and employees of [NASDAQ OMX] shall be
deemed to be the books, records, premises, officers, Directors, and
employees of such Self-Regulatory Subsidiary for the purposes of,
and subject to oversight pursuant to, the [Exchange] Act.

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Honorable Robert W. Sweet

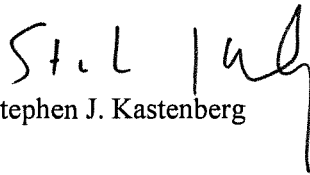
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NASDAQ OMX By-Laws Article XII, § 12.1(c). While Section 12.1(c) and other provisions of the by-laws do, as Mr. Lovell asserts, “operate[] to subject OMX and its officers to the jurisdiction and oversight of the SEC,” the language of Section 12.1(c) goes considerably further by deeming NASDAQ OMX officers to be officers of the Exchange for purposes of the Exchange Act to the extent their activities are related to the activities of the Exchange. And, contrary to Mr. Lovell’s assertion that NASDAQ OMX and its officers must remain independent of the Exchange, Section 12.2(b) of NASDAQ OMX’s by-laws requires such officers to cooperate with the Exchange in respect of its “self-regulatory functions and responsibilities.”

Whether arising out of the actions taken (or not taken) on the day of the Facebook IPO, or arising out of what Mr. Lovell characterizes as “antecedent negligence” in the design and testing of the IPO Cross, all of plaintiffs’ claims concern activities within the scope of the regulatory functions of the Exchange. Those claims should accordingly be dismissed on the ground of SRO immunity whether asserted against the Exchange itself or against NASDAQ OMX and its officers.

Respectfully yours,

A handwritten signature in black ink, appearing to read "S. J. Kastenberg", with a long vertical line extending downwards from the end of the signature.

Stephen J. Kastenberg

cc: Vincent R. Cappucci
Douglas G. Thompson
Christopher Lovell
Jacob H. Zamansky
Kevin I. Goldberg
Marvin A. Miller
Vincent Di Tommaso
Thomas J. McKenna
Richard J. Schager, Jr.